In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1590

DONALD KUSTOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his federal prosecution under 18 U.S.C. 659[1] was barred by the previous dismissal of state charges based on an Illinois statute requiring that a defendant be tried within 120 days from the date he demands trial.[2]

Before trial in the United States District Court for the Northern District of Illinois, petitioner moved to dismiss

[1] 18 U.S.C. 659 provides in pertinent part:

> A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

[2] Smith-Hurd Ill. Anno. Stats., Ch 38, § 103-5(b), provides in pertinent part:

> Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial * * *.

At the time of petitioner's trial, the then-applicable version of this statute specified 120 rather than 160 days.

his federal indictment because of the dismissal, under the Illinois 120-day statute, of state charges based on the same acts charged in the federal indictment. The district court denied petitioner's motion to dismiss. After a bench trial, petitoner was convicted of having possessed goods stolen from an interstate shipment, in violation of 18 U.S.C. 659. He was placed on two years' probation. The court of appeals affirmed (Pet. App. A).

Petitioner does not dispute the facts in this case. The evidence showed that a Cook County police officer observed petitioner standing on the rear of a tractor-trailer in a secluded forest preserve area and saw him hand a box to a co-defendant, McAdrian, who then placed the box inside his car (Tr. 7-11, 86). McAdrian fled when the officer sought to question him and petitioner about their activity (Tr. 20-24). Thereupon, the officer searched McAdrian's car and found several boxes of stolen tape recorders (Tr. 27).

Petitioner's argument that a dismissal for prosecutorial laxity is a "judgment of * * * acquittal on the merits," which, under the terms of Section 659, would bar federal prosecution, is not supported by either logic or authority. In normal legal usage, a judgment on the merits requires some consideration of the circumstances of a case and would not include a judgment based on matters of practice or procedure, such as want of prosecution.[3]

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[3] II *Bouvier's Law Dictionary* (Rawle's 3d rev., 1914) defines the words "Judgment on the Merits" as follows:

> [O]ne rendered after argument and investigation, and when it is determined which party is in the right, as distinguished

This Court shed some light on the matter in *United States* v. *Marion*, 404 U.S. 307, in which jurisdiction to entertain the government's appeal depended on a finding that the defendants had not been put in jeopardy prior to dismissal of the indictment on speedy trial grounds. The Court stated (*id.* at 312):

> The motion to dismiss rested on grounds [undue delay prior to indictment] that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance * * *.

While it might be argued that, under Section 659, it is the State's characterization of the nature of the dismissal that controls, the Illinois courts have never indicated that a discharge under the 120-day rule should be considered a general acquittal on the merits. In *People* v. *White*, 98 Ill. App. 2d 1, 3-4, a subsequent prosecution for violation of parole was allowed based on facts charged in an indictment which was dismissed under the 120-day rule. The court stated, "discharge of the defendant under the 120-day rule does nothing so far as determining the truth of the facts in the May 17 complaint." *People ex rel Nagel* v. *Heider*, 225 Ill. 347, 80 N.E. 291, alluded to by petitioner, only indicated that the purposes of expedition advanced by the statue would be defeated if the accused could be reindicted for the same offense after such a dismissal.

In the present case, however, no policy would be served by allowing defendant's dismissal. The federal

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from a judgment rendered upon some preliminary or merely technical point, or by default, and without trial.

See also *Goddard* v. *Security Title Insurance and Guarantee Co.*, 83 P. 2d 24, 27-28 (Calif.); *Beam* v. *Almond*, 271 N.C. 509, 515, 157 S.E. 2d 215, 221.

policy of deferral to state prosecution applies only when guilt or innocence has been determined. State prosecutorial inertia should not bar federal prosecution when no federal standard has been breached. See Fed. R. Crim. P., Rule 48(b).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

[4]Federal law is liberal in this regard. A dismissal under Rule 48 (b) does not bar subsequent prosecution. *Cohen* v. *United States*, 366 F. 2d 363, 367 (C.A. 9).